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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ELMER B. STAATS, COMPTROLLER GENERAL
OF THE UNITED STATES, AND
UNITED STATES OF AMERICA,
PETITIONERS

v.

BRISTOL LABORATORIES DIVISION OF
BRISTOL-MYERS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Statement

The government Petition states, at page 5, "[Bristol] also refused to provide 'records relating to the methodology and decisions involved in the firm's establishment of prices for the products purchased under the contracts' [C.A. App. 81]."

The language quoted was not Bristol's, but, rather, the Comptroller General's. Bristol, from the very beginning, has been willing to furnish records relating to such methodology and decisions regarding the prices to the government for the products purchased under *its* contracts. It refused

only with respect to prices to non-governmental purchasers. (C.A. App. 83)

ARGUMENT

I.

There is not such a conflict of law among the circuits as the government attempts to portray. (Petition, pp. 8-9.)

The difference in outcomes between, on the one hand, *Hewlett-Packard,*[1] *Lilly*[2] and *Abbott,*[3] and, on the other, the within case,[4] is rooted in the variant views of the respective courts as to facts they found to be determinative in their individual cases rather than in conflict concerning the law itself.

There would, as will be shown below, appear to be no disagreement among the circuits that "books, documents, papers, and records" reflecting components of a price charged the government by a contractor in a negotiated contract "involv[e] transactions related to such contracts" and, when "directly pertinent" to such price-determining factors, must be accessible by the Comptroller General pursuant to contracts under 10 U.S.C. 2313(b) and 41 U.S.C. 254(c). Conversely, there is no apparent inter-circuit disagreement that "transactions" which do not impact upon price or performance do not "relate to such contracts"; and that records of such unrelated transactions (whether

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[1] *Hewlett-Packard Co.* v. *United States,* 385 F.2d 1013 (9th Cir. 1967), *cert. denied,* 390 U.S. 988.

[2] *Eli Lilly & Co.* v. *Staats,* 574 F.2d 904 (7th Cir. 1978), *cert. denied,* 439 U.S. 959.

[3] *United States* v. *Abbott Laboratories,* 597 F.2d 672 (7th Cir. 1979).

[4] *Bristol Laboratories* v. *Staats,* 620 F.2d 17 (2d Cir. 1980).

or not "directly pertinent" to them) are not made accessible by the statutory and contractual provisions now under consideration. Even less, if possible, is there manifestation of any circuit deeming that in light of the qualifications "*directly* pertinent to" or "*directly* pertain to" (emphasis supplied) the Comptroller General is empowered to explore every book, document, paper, and record that is at all related to any and every cost going into any and every product manufactured by a firm that happens to have one or more supply contracts with the government.

In each of the Ninth and Seventh Circuit cases referred to above, the courts found *as fact* that the contractor's records at issue reflected elements entering into the prices charged the government. In the case at bar, to the contrary, the courts below have unanimously[5] found that the records denied to the Comptroller General contain no such data. It was upon that *factual* finding,[6] made by the courts below after the government had been given full opportunity to discover the nature of the withheld records,[7] that

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[5] "We affirm for the reasons given in Judge Lasker's excellent opinion . . . to which we refer the reader." (Petition, p. 3a)

[6] "The documents, affidavits and memoranda of law submitted by the parties establish that the controversy is not as much over the legal construction of the right-of-access clause in the contracts and statutes, as it is a factual dispute concerning Bristol's actual accounting and business procedures." (Memorandum of district court on cross motions for summary judgment, C.A. App. 20.)

[7] "Discovery is necessary to enable the government to inform itself as to Bristol's methods of accounting and allocation of costs * * * * [T]he proper course to follow is to restrict initial discovery by the Comptroller General (CG) to depositions of knowledgeable officers of Bristol Labs as to Bristol's methods and procedures for allocation of costs of all items not allocated exclusively to non-government contracts. No discovery shall be made of the books or accounts of Bristol Labs until termination of the depositions required above. Upon termination of such depositions the parties shall be free to move for such relief as appears justified." (*Idem*, C.A. App. 22-23.) The government did not move for any further discovery.

they concluded such books and records were not directly pertinent to transactions related to Bristol's contracts with the government[8] and that the government's contrary argument is such as to open virtually every income and expense related book, document, paper, and record of Bristol to the Comptroller General's perusal.[9]

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[8] "[The Comptroller General] is, of course, entitled to examine all 'directly pertinent records involving transactions related to the contract.' Although these words give general guidance, they do not provide answers to the specific questions which arise in the context of each case. We agree with the government that the issue should not depend entirely on a contractor's bookkeeping method, i.e., whether it does or does not assign particular costs to particular contracts or products. However, we do not understand this to be Bristol's contention. As set forth above, Bristol allocates only the direct cost of manufacture by product. These are among the costs it offers to make available, but they are by no means the limit of its offer. Rather, Bristol is willing to provide all records relating to manufacturing costs and the pricing of the products sold to the government. The specific list of items Bristol offers to make available, set forth at page 3, *supra*, appears to reflect a responsible and reasonable effort to distinguish 'directly pertinent' matter within the meaning of the access to records clause. It represents a sensible point at which to draw the line."(Petition, p. 12a.)

[9] "Bristol agrees that it is obliged by the terms of the contracts to provide access to records of its manufacturing costs, records which relate to the pricing of the products delivered and records required to verify all data obtained during the course of the review. Accordingly, Bristol states that it is ready and willing to allow GAO personnel to inspect its books and records with regard to the following items, which it lists as factors taken into account in setting prices to the government: manufacturing costs (including raw and packaging materials, labor and fringe benefits, quality control and supervision); manufacturing overhead (including plant administration, production planning, warehousing, utilities and security); royalty expenses; and delivery costs. However, it strenuously resists producing data with respect to research and development, marketing and promotion, distribution and administration (except to the extent that these areas may be included in the factors listed above), because it claims that these costs are too remote to the contracts and have only the most general relation, if any, to the prices charged.

"The United States insists that the GAO may inspect Bristol's records with respect to any and all costs met in whole or in part

With these as given facts—i.e., that the records sought do not pertain to factors entering into the contract prices, and the governmental search would extend to virtually all of Bristol's books and records[10]—there is no reason to believe, and the government has shown none, that either the Ninth or the Seventh Circuit would reach a different conclusion in a case presenting those facts than has the Second Circuit.

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from revenues earned on the federal contracts, whether or not those costs are specifically assigned by Bristol to the contracts or the products delivered. According to the government the test is simply 'whether the burden of [the] costs is borne by the Government in the prices it must pay for the contract items.' (Government's Memorandum, August 29, 1975 at 13)

"The Government's theory has far reaching implications. The only items excludable from the Comptroller General's reach would be those, if any, which relate to the costs recovered exclusively from non-government contracts. (Government's Memorandum, August 29, 1975 at 13) It is undisputed, however, that Bristol does not separately compute the cost of government and non-government contracts or pay for them out of separate funds. Accordingly, there are no excludable records under the Government's theory. Indeed, the company does not compute the costs attributable to any particular contract. It does allocate certain direct costs, for manufacturing and overhead, by product. Records of these expenses are thus readily available and are among those the company concedes to be discoverable. Its other expenses are not allocated at all; they are pooled and met out of gross revenues. In other words, revenues from government contracts are co-mingled with revenues from non-government contracts, and the resulting fund is used to pay for all expenses. If the government's interpretation of the access to records clause is correct, Bristol will be required to make available virtually all of its books and records, because although it is impossible to trace the use of government dollars, those dollars contribute to the fund from which all of the company's expenses are paid. (Petition, pp. 8a-10a.)

[10] These are the facts which, having been agreed upon by both courts below, this Court would accept if it granted the writ of certiorari petitioned for. *Branti* v. *Finkel*, —— U.S. ——, at ——, 100 S.Ct. 1287, at 1291 n.6 (1980); *Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630, 670 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949).

In each of the other circuits' decisions upon which the government relies the facts patently were, or at least were deemed by the courts to be, that the transactions as to which books and records access was sought by the Comptroller General were such as to register their impact upon the prices to the government. Thus:

Hewlett-Packard (supra, p. 2) was embraced by *Lilly* (supra, p. 2) as a determinative precedent,[11] and consequently was carried forward as the genetically controlling source of the *Abbott* decision (infra, p. 8). However, a fair reading of *Hewlett-Packard* clearly indicates that the Ninth Circuit was not concerned with the Comptroller General's right to access a contractor's records of costs neither involved in negotiating nor incurred in fulfilling a government contract. Thus, the case presents no conflict with the one at bar and provides no basis for construing *Lilly* or *Abbott* as though they do.

To the extent that it may be relevant, *Hewlett-Packard* supports the Second Circuit for there the records to which the Comptroller General was given access were only those "relating to the cost of producing the items furnished by Hewlett-Packard Company under the aforesaid contracts, including costs of direct material, direct labor and overhead costs".[12] The Comptroller General was, accordingly, not permitted so expanded an examination of records as he seeks here, and the case is not authority for allowing it.

> Production costs directly pertain to that subject matter . . . Production costs involve transactions relating to the contract, because they encompass business arrangements made by the contractor in obtaining the materials, labor, facilities and the like required

[11] 574 F.2d at 912-13.

[12] 385 F.2d at 1016.

by it in fulfilling its commitment with reference to the subject matter of the contract. (385 F.2d at 1016.)

Lilly itself is in its holding conformant in the above respect with *Hewlett-Packard* and not in conflict with the Second Circuit. Its decision was based upon a factual conclusion that the records sought by the Comptroller General contained information as to costs that affected the prices charged the government. The *Lilly* court was convinced that as a matter of fact the research and development costs involved in that case "at the least appear to have a logical, causal and consequential relationship to a portion of the price of the products purchased by the Government." [13] Thus, the difference in result between *Lilly* and the courts below in this case is entirely accountable for by their variant views of the facts.

One may agree or disagree with the Seventh Circuit's factual determination,[14] one may maintain or dispute that

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[13] The court continued, "Further, contrary to plaintiff's contention, such costs are not 'remote' within the established definitions of that term in relation to at least a portion of the price because their inclusion of the price in the product is not unforeseeable once the costs are incurred, nor is their impact on a part of the price significantly altered by any intervening cause." (574 F.2d at 914.)

"[T]he district court need not grant access to any additional documents, and no information need be produced relating to classes of costs that have no more than a *de minimis* impact on the price of a product purchased by the Government." (*Idem* at 918.)

[14] There can be a variety of reasons why a contractor might be willing to negotiate a price, whether with the government or a private customer, that does not defray particular operational costs. Prestige might be one; establishing an initial contact and, hopefully, resultant good will with a potentially long term purchaser; reduction of down-time on manufacturing lines, thus ameliorating unproductive overhead; economies of scale in procuring raw materials as a result of the increased volume from the additional patronage. In any event, as mentioned above, the government had full opportunity through discovery in the within case to demon-

the Second Circuit's (and district court's) findings as to the facts herein should have been the same as those of the Seventh Circuit, but all of that is beside the present point. The oppositeness of their final rulings is a product of different factual perceptions, not of conflict as to substantive law. A mere difference in ultimate decisions of fact among separate courts, each based on its own, distinct, evidentiary record, does not present such a conflict as calls for review by this Court.[15]

Even if the *Lilly* determination were considered to be one of law, in conflict with a substantive conclusion by the Second Circuit herein, revisitation of *Lilly* in the light of *Abbott* and evaluation of their composite significance makes clear that such a postulated conflict no longer exists. The substantive stance that the government would attribute to *Lilly* would, from any realistic point of view, no longer be extant, if ever it was. Two of the three judges in *Abbott* made clear that they would have decided *Lilly* the other way, had they sat upon it; and they held as they did in *Abbott* only because of the constraint of *stare decisis*. (597 F.2d at 674-75.)

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strate, if it had been the true fact, that Bristol's withheld records contained information relating to transactions that did actually find their way into the prices set in the negotiated contracts herein or could reasonably have been expected to have done so (supra, p. 3).

[15] The Seventh Circuit's rulings with regard to the improper purpose of the Comptroller General, which occupied so much attention in *Lilly* (574 F.2d at 909-12) and *Abbott* (597 F.2d at 674-75) find no counterpart in the within case's issues or decisions to conflict with.

II.

The decision of the courts below is totally accordant with the legislative history of 10 U.S.C. 2313(b) and 4 U.S.C. 254(c). (Petition, pp. 10-17.)

The driving motivation of the congress was to empower the Comptroller General to audit governmental contracts' costs and performance to the end that the government be guarded against excessive cost or waste. The listing recited in the Petition resounds with that dominant, if not single-minded, purpose.

But, if Bristol's contracts with the government are not overpriced without taking into account its pool of research and development, advertising and promotion, distribution, and administration costs to offset its gross income from them, they certainly could not become so by introducing those costs. Quite the contrary.

If Bristol was satisfied to proffer no costs other than those enumerated at page 4, fn. 9 above, to justify the prices in the subject contracts, certainly no harm is done to the Comptroller General's responsibility and core interest to monitor the reasonableness of Bristol's prices to the government. Excluding cost items from the substantiation of prices can put only downward pressure on them to be fair.

Inquiry by the Comptroller General into such other, but unincluded, expenses would enhance but could not impugn the fairness of Bristol's prices. Without including those costs as justification, Bristol's prices stand in their poorest light for reasonableness. Adding them could only improve Bristol's appearances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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